No. 94-57

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In the Supreme Court of the United States

OCTOBER TERM, 1994

HTC INDUSTRIES, INC., PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a government contractor is entitled to additional reimbursement when the contractor voluntarily continues work after its costs have exceeded the contract price and no contracting officer has approved additional funds.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-16a) is unpublished, but the decision is noted at 22 F.3d 1103 (Table). The initial decision of the Armed Services Board of Contract Appeals (Pet. App. 17a-58a) is reported at 93-1 B.C.A. (CCH) ¶ 25,560 and its decision on reconsideration (Pet. App. 77a-80a) is reported at 93-2 B.C.A. (CCH) ¶ 25,701.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1994. A petition for rehearing was denied on April 15, 1994. Pet. App. 75a-76a. The petition for a writ of certiorari was filed on July 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was awarded a contract by what is now the Army Materials Technology Laboratory (the Laboratory) to design and fabricate a pilot facility for electroplating titanium diboride, an extremely hard material, onto machine tools. Dr. Harold T. Couch, petitioner's president, anticipated commercial and military uses for the coatings and hoped to advance the process and make production economically feasible. The contract provided that petitioner would receive reimbursement based on "cost plus fixed fee." The parties specified an estimated cost of $230,520 and a fixed fee of $18,442, for a total contract price of $248,962. Under the contract, that sum represented "the estimated cost for the purpose of the Contract Clause entitled 'Limitation of Cost' FAR [Federal Acquisition Regulation] 52.232-20." Pet. App. 18a, 20a-21a.

FAR 52.232-20(b) requires the contractor to notify the project's contracting officer whenever it has reason to believe that, within the next 60 days, the total of costs anticipated and already incurred will exceed 75 percent of the estimated cost.[1] Unless the contract specifies otherwise, the government has no obligation to reimburse a contractor for costs incurred in excess of the estimated cost. FAR 52.232-20(d)(1). Correspondingly, under FAR 52.232-20(d)(2), the contractor is not obliged to continue performance or to incur costs in excess of the estimated cost until the contracting officer notifies the contractor in writing that the estimated cost has been increased and provides a revised estimated total cost. No notice in any form other than that specified in

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[1] FAR 52.232-20 (1984), which is codified at 48 C.F.R. 52.232-20, is set out in pertinent part at Pet. App. 19a-20a.

FAR 52.232-20(d)(2), "or from any person other than the [c]ontracting [o]fficer," can affect the contract's estimated cost. If the contracting officer has not provided such notification, the government is not obligated to pay more than the estimated cost. FAR 52.232-20(e).[2]

2. The contract in this case instructed the contracting officer to "designate in writing a Contracting Officer's Technical Representative (COTR)" to represent him in "technical matters under this contract." Pet. App. 26a. That provision expressly limited the COTR's authority as follows:

> NOTE: NO DIRECTION, INSTRUCTION OR INFORMATION, EMANATING FROM THE COTR, OR ANY PERSON EMPLOYED BY THE UNITED STATES GOVERNMENT, WHICH MAY * * * CHANGE THE ESTIMATED COST OF THE WORK UNDER THE CONTRACT * * * SHALL BE BINDING ON THE GOVERNMENT UNLESS A PRIOR AUTHORIZED INSTRUMENT OR MODIFICATION TO THIS CONTRACT IS DULY ISSUED BY THE CONTRACTING OFFICER.

Id. at 27a.

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[2] FAR 32.704(a)(1) sets out the notification process under FAR 52.232-20. Upon learning that the contract is approaching its estimated cost, the contracting officer is to obtain funding and programming information promptly and then notify the contractor that additional funds have been allotted, that there will be no further funding, that the contract is terminated, or that the government is still weighing the decision and the contractor may either stop work when the cost limit is reached or continue at its own risk. See 48 C.F.R. 32.704(a)(1) (set out at Pet. App. 84a-85a).

The contracting officer designated Milton Levy, an experienced researcher and scientist, as COTR for the contract, and the contracting officer sent petitioner a copy of the official appointment letter. Pet. App. 25a. That letter delegated to Levy the contracting officer's authority to take all actions not specifically prohibited by the contract, "PROVIDED such actions DO NOT involve a change in price." *Ibid.* (quoting March 30, 1985 appointment letter (capitalization in original)). In addition, the contracting officer's accompanying letter expressly noted Levy's lack of authority to issue changes affecting contract price. *Id.* at 26a. Couch, petitioner's president, knew of the written limitations on Levy's authority and of the specific terms of the FAR "Limitation of Cost" clause. *Id.* at 34a-35a.

3. During the construction of the pilot facility, petitioner's costs exceeded 75 percent of the estimated contract cost. Petitioner did not notify the government of that development at that time. Pet. App. 22a-23a. Petitioner then submitted a proposal for a contract price increase to $371,034. *Id.* at 24a. The contracting officer did not send petitioner a notice of decision on that overrun proposal. *Id.* at 35a-36a. Couch and Levy had a series of meetings and conversations concerning the technical progress of the work. *Id.* at 28a-34a. Levy encouraged Couch to continue to supply samples for the Laboratory to test. *Id.* at 34a. Levy also told Couch that he would try to find the money to pay for work done above the estimated cost. *Ibid.* Levy, however, gave no assurance of any additional money, and Couch knew or should have known that Levy had provided no guarantees. *Ibid.*[3]

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[3] For example, Couch laid off an employee, explaining that he did not expect Levy to find additional money for the project, and

During that period, petitioner encountered technical problems in performing the contract work. Pet. App. 30a-32a. In addition, a system regulator at petitioner's facility failed, causing extensive damage. *Id.* at 33a. At the time, the government had reimbursed petitioner for about two-thirds of the cost of the facility. *Ibid.* Without instruction or permission from the government, Couch repaired the facility. He did so in anticipation of receiving a grant from the State of Connecticut to continue the work in conjunction with the University of Connecticut. *Id.* at 33a-34a.

4. The government issued a Notice of Termination of the Contract for the Government's Convenience under FAR 52.249-6. Pet. App. 38a. Petitioner's attorney submitted a settlement proposal seeking $195,252.81. *Id.* at 39a. The Termination Contracting Officer (TCO) ultimately allowed $6,107.47, the difference between what petitioner had already been paid and the contract limit of $248,962. *Ibid.* In addition, the government offered to allow petitioner to retain the facility and miscellaneous inventory. *Id.* at 41a. Petitioner rejected that offer and filed a claim with the TCO for equitable adjustment under FAR 52.243-2. Petitioner sought $2,180,241, based on its allegations that Levy instructed petitioner to continue working and that the contracting officer failed to respond to petitioner's overrun notice and proposal for extension. Pet. App. 41a. The TCO denied the claim but renewed the government's earlier offer concerning the facility and inventory. *Id.* at 43a, 60a.

5. The Armed Services Board of Contract Appeals denied petitioner's claim for reimbursement. Pet. App.

Couch wrote to a colleague that he and Levy "may both be stymied" by congressional budget cuts for research and development. Pet. App. 31a-32a.

49a-57a. The Board rejected petitioner's claims that Levy had authorized reimbursement, stating that the written terms of the contract "could not have been clearer" with respect to Levy's lack of authority to bind the government for cost overruns. *Id.* at 50a. The Board also concluded that the government did not impliedly ratify the funding commitments that petitioner alleged Levy to have made. *Id.* at 52a. The Board specifically noted that the government's failure to provide an official response to petitioner's overrun proposal did not entitle petitioner to reimbursement for work it subsequently performed. *Id.* at 52a-53a. The Board also concluded that even if petitioner could invoke equitable estoppel against the government on a government contract claim, petitioner failed to satisfy the requirements for that relief. *Id.* at 53a-55a. The Board ordered the parties to resume negotiations so as to arrive at "an equitable distribution of all property produced or purchased under the contract," as provided by FAR 52.232-20(h) (48 C.F.R. 52.232-20(h)). Pet. App. 57a.

6. The Federal Circuit affirmed the Board's decision, holding that the decision was supported by substantial evidence. Pet. App. 1a-8a. The court found that the contract's "[e]xplicit, unambiguous language" established Levy's lack of authority to modify the cost estimate. *Id.* at 4a. It held that no authority beyond the written contract could be implied here, because Couch admitted knowing the written restrictions on Levy's authority. *Id.* at 4a-5a. The court further held that Couch's knowledge that reimbursement for the cost overrun could not be expected precluded any basis for invoking equitable estoppel. *Id.* at 6a-7a. The court noted that petitioner always had the option of refusing to perform further without authorization from the contracting officer "as the contract envisioned." *Id.* at

7a. Judge Newman dissented from the court of appeals' decision.

ARGUMENT

Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. 607(g). That court reviewed the decision of the Armed Services Board of Contract Appeals and properly affirmed the Board's decision rejecting petitioner's demand for additional reimbursement. The Federal Circuit and the Board resolved the dispute by applying the plain terms of the contract to the facts of this particular case. That factbound decision is correct and does not warrant further review. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

The Federal Circuit and the Board accurately characterized this case as "a classic example of why contracts are put in writing." Pet. App. 4a, 56a. The contract and the regulations it incorporated expressly specified how cost overruns would be resolved. The contract, the applicable regulations, and other correspondence sent to petitioner clearly informed petitioner that Levy, who served solely as the contracting officer's technical representative, could not obligate the government to provide additional funding. See Pet. App. 3a-5a, 18a-20a, 25a-27a; FAR 52.232-20 (1984), 48 C.F.R. 52.232-20.

Couch, who served as petitioner's president, knew that the express terms of the contract, the FAR, and Levy's appointment letter all prevented Levy from binding the government for reimbursement of cost overruns. Pet. App. 5a, 34a-35a. Couch also knew or should have known that Levy never promised such reimbursement. *Id.* at 7a, 34a. Indeed, even if Levy had guaranteed payment, petitioner would not have been entitled to rely on that

guarantee in the absence of the contracting officer's ratification. *Id.* at 7a, 52a. See FAR 52.232-20(d)(2) and (h). Any encouragement Levy might have offered with respect to continued funding or work could neither override the plain words of the contract and the FAR nor provide a basis for invoking equitable estoppel principles. See Pet. App. 6a-7a; 53a-56a.

As the court of appeals and the Board explained, in the absence of a contracting officer's written overrun approval, petitioner could either keep working and hope for the best or cease performance. Pet. App. 7a, 53a. See FAR 52.232-20(d)(2). Petitioner elected to continue working despite the cost overruns and thereby assumed the risk that it might not be reimbursed for the additional expenses it incurred.[4]

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[4] Petitioner's various subsidiary contentions are without merit. For example, petitioner claims (Pet. 15) that a "misrepresentation" by another government employee as to the availability of a contracting officer prevented petitioner from dealing with one. Both the Board and the court of appeals rejected that factual claim and found that "no authorized officer of the Government misled [petitioner]." Pet. App. 6a. Indeed, the facts show that Couch studiously avoided communication with anyone other than Levy as a calculated tactic to maximize his chance for additional funding. See *id.* at 34a. Petitioner's other allegations of misrepresentation and fraud are similarly without foundation and do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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